

ADMINISTRATIVE LAW: Exercise of administrative powers - Reasoned decision - Commercial Vehicle Licensing Board (CVLB) allowed RapidKL to charge lower stage bus fares from what was statutorily provided - Whether action unfairly discriminatory to appellant - Whether CVLB's decision rational and reasonable - Whether decision taken bona fide after considering general public interest - Whether appellant failed to show RapidKL's lower fares caused it to suffer loss

The appellant was in the business of providing public transport services. The first respondent ('CVLB') was at the material time a statutory body established under the Commercial Vehicles Licensing Board Act 1987 and its powers included the granting of licences to operate various classes of public service vehicles and attaching such conditions to the licences as it thought fit. CVLB had granted the appellant a licence to operate stage buses. The fare structure applicable to the appellant, and to others in its class, was as set out under the Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 ('the Rules'). Three years earlier, the second respondent, through the Finance Ministry, had incorporated a company, commonly known as RapidKL, to provide an integrated public transport system in the Klang Valley incorporating bus and rail services. RapidKL took over the operations of, among others, stage bus services then provided in the Klang Valley by the Intrakota and Cityliner bus companies. CVLB had approved a much lower fare rate structure to RapidKL for its stage bus services from what was provided under the Rules. The appellant's complaint was that this action by CVLB was unfairly discriminatory towards the appellant and caused it to incur huge losses as a result of its losing its customers to RapidKL.

The appellant appealed to the respondents on several occasions to rectify the problem but CVLB's stand was that the appellant could apply to have the same fare rate structure for its stage buses that RapidKL had. The appellant applied to the High Court for judicial review and sought: (i) an order of *mandamus* directing the respondents to enforce the rates of fare prescribed under the Rules on RapidKL; (ii) a declaration that CVLB's decision not to adhere to the Rules and the second respondent's failure, omission or refusal to enforce the fare rates prescribed under the Rules on RapidKL had violated the Rules and art. 8(1) of the Federal Constitution; and (iii) damages, with interest, from the respondents for losses it had suffered as a result of the respondents' actions/omissions. Apart from granting a declaration that CVLB's decision to allow RapidKL to charge the lower fares was *ultra vires* the Rules, the High Court refused the other reliefs sought, causing the appellant to appeal to the Court of Appeal. In the appeal, the relief for *mandamus* was abandoned and the appeal proceeded solely on the ground that the respondents had violated art. 8(1) of the Federal Constitution and for that reason damages was claimable.

Held (unanimously dismissing appeal with costs)

Per Azahar Mohamed JCA delivering the judgment of the court:

- (1) The first respondent's decision in approving RapidKL's application to impose lower rates of fares for its stage buses could not be said to be arbitrary or excessive. Upon an objective assessment of all relevant facts, the introduction of the RapidKL fares was not unjust or unreasonable or unfairly biased in favour of RapidKL. There was legitimate reason necessitating the first respondent to allow RapidKL to impose the lower fares without adhering to the Rules. (para 25)
- (2) The first respondent had explained that the approval given to RapidKL's fares was based on the policy and strategy of providing an integrated public transport service in the Klang Valley after taking into consideration the element of general public interest. This departure or deviation (from imposing the fares prescribed in the Rules) was rational and reasonable and was not suggestive of discrimination or arbitrariness as it served the general public interest of providing a better and more efficient public transport service in the Klang Valley. (paras 23 & 25)

- A (3) There was nothing to show that the first respondent had acted *mala fide* or out of improper motive. Its explanation why RapidKL was allowed to charge the lower fares proved that the approval given to RapidKL was made in good faith or at least with *bona fide* intention. (para 27)
- B (4) The appellant had failed to establish that the introduction of RapidKL's fares had led it to suffer loss and other financial problems. There was no concrete evidence of any nexus to show the financial difficulty suffered by the appellant was mainly caused by RapidKL's lower fares. As stated by the
- C High Court, the purported reduction in the appellant's daily and monthly fare collection was not based on any credible study or market survey. (para 29)
- D (5) The High Court was entirely correct in holding there was insufficient evidence to support a finding that the respondents had practised unfair discrimination on the appellant. (para 30)

Bahasa Malaysia Translation Of Headnotes

- E Perayu menjalankan perniagaan menyediakan perkhidmatan pengangkutan awam. Responden pertama ('LPKP') adalah pada masa material, sebuah badan berkanun yang ditubuhkan di bawah Akta Lembaga Pelesenan Kenderaan Perdagangan 1987 dan kuasanya termasuklah memberikan lesen untuk mengendalikan
- F pelbagai kelas kenderaan perkhidmatan awam dan melampirkan apa-apa syarat kepada lesen yang difikirkannya sesuai. LPKP telah memberikan perayu lesen untuk mengendalikan bas henti-henti. Struktur tambang yang dikenakan kepada perayu, dan kepada orang lain dalam kelasnya, adalah seperti yang dinyatakan di bawah
- G Peraturan Lembaga Pelesenan Kenderaan Perdagangan (Kadar Tambang) 2000 ('Peraturan'). Tiga tahun sebelumnya, responden kedua melalui Kementerian Kewangan telah menubuhkan sebuah syarikat, dikenali sebagai RapidKL, untuk menyediakan sistem pengangkutan awam bersepadu di Lembah Klang yang
- H menggabungkan perkhidmatan bas dan rel. RapidKL mengambil alih operasi, antara lain, perkhidmatan bas henti-henti yang ketika itu disediakan di Lembah Klang oleh syarikat-syarikat bas Intrakota dan Cityliner. LPKP telah meluluskan struktur kadar tambang yang lebih rendah untuk RapidKL bagi perkhidmatan bas henti-henti
- I berbanding apa yang telah diperuntukkan di bawah Peraturan. Aduan perayu adalah bahawa tindakan oleh Lembaga Pelesenan

Kenderaan Perdagangan (LPKP) adalah secara tidak adil mendiskriminasi perayu dan menyebabkannya menanggung kerugian besar akibat kehilangan pelanggan-pelanggannya kepada RapidKL. Perayu merayu kepada responden-responden beberapa kali untuk mengatasi masalah tetapi pendirian LPKP adalah bahawa perayu boleh memohon untuk mendapatkan struktur kadar tambang yang sama bagi bas henti-henti RapidKL. Perayu memohon kepada Mahkamah Tinggi untuk semakan kehakiman dan memohon: (i) satu perintah *mandamus* mengarahkan responden untuk menguatkuasakan kadar tambang yang ditetapkan di bawah Peraturan-Peraturan untuk RapidKL; (ii) suatu pengisytiharan bahawa keputusan LPKP tidak mematuhi Peraturan berkenaan dan kegagalan, peninggalan atau keengganan responden kedua untuk menguatkuasakan kadar tambang yang ditetapkan di bawah Peraturan di RapidKL telah melanggar Peraturan dan perkara 8(1) Perlembagaan Persekutuan; dan (iii) ganti rugi, dengan faedah daripada responden bagi kerugian yang telah dialami akibat tindakan/tinggalan responden. Selain daripada membenarkan satu deklarasi bahawa keputusan LPKP membenarkan RapidKL untuk mengenakan tambang yang lebih rendah adalah *ultra vires* Peraturan, Mahkamah Tinggi menolak relif-relif lain yang dipohon, menyebabkan perayu merayu ke Mahkamah Rayuan. Dalam rayuan, relif untuk *mandamus* telah diabaikan dan rayuan diteruskan semata-mata atas alasan responden telah melanggar perkara 8(1) Perlembagaan Persekutuan dan atas sebab tersebut, ganti rugi boleh dituntut.

Diputuskan (sebulat suara menolak rayuan dengan kos)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

- (1) Keputusan responden pertama dalam meluluskan permohonan RapidKL untuk mengenakan kadar tambang yang lebih rendah bagi bas henti-henti tidak boleh dikatakan dibuat sewenang-wenangnya atau berlebihan. Setelah penilaian objektif dibuat ke atas semua fakta yang berkaitan, pengenalan tambang RapidKL bukan tidak adil, tidak munasabah atau berat sebelah memihak kepada RapidKL. Terdapat alasan yang sah yang memerlukan responden pertama membenarkan RapidKL untuk mengenakan tambang yang lebih rendah tanpa mematuhi Peraturan.

- A (2) Responden pertama telah menjelaskan bahawa kelulusan yang diberikan ke atas tambang RapidKL berdasarkan dasar dan strategi menyediakan perkhidmatan pengangkutan awam bersepadu di Lembah Klang selepas mengambil kira elemen kepentingan awam. Pelepasan atau sisihan ini (daripada
- B mengenakan tambang yang ditetapkan di dalam Peraturan) adalah rasional dan munasabah dan tidak menyarankan diskriminasi atau kesembarangan kerana ia bertujuan untuk kepentingan awam dalam menyediakan perkhidmatan pengangkutan awam yang lebih cekap di Lembah Klang.
- C (3) Tiada apa-apa yang menunjukkan bahawa responden pertama telah bertindak *mala fide* atau mempunyai motif yang tidak wajar. Penjelasannya tentang mengapa RapidKL dibenarkan untuk mengenakan tambang yang lebih rendah membuktikan
- D bahawa kelulusan yang diberikan kepada RapidKL telah dibuat dengan suci hati atau sekurang-kurangnya dengan niat *bona fide*.
- E (4) Perayu telah gagal untuk membuktikan bahawa pengenalan tambang RapidKL telah menyebabkan ia mengalami kerugian dan lain-lain masalah kewangan. Tiada bukti yang konkrit bagi sebarang pertalian untuk menunjukkan kesukaran kewangan yang dialami oleh perayu terutamanya disebabkan oleh tambang RapidKL yang lebih rendah. Seperti yang dinyatakan oleh
- F Mahkamah Tinggi, pengurangan dalam kutipan tambang harian dan bulanan perayu bukan berdasarkan sebarang kajian kredibel atau tinjauan pasaran.
- G (5) Mahkamah Tinggi betul sepenuhnya dalam memutuskan tidak terdapat bukti yang mencukupi untuk menyokong dapatan bahawa responden telah mengamalkan diskriminasi yang tidak adil kepada perayu.

Case(s) referred to:

Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA (*refd*)

- H *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 1 LNS 100 FC (*refd*)
Ranbir Singh v. Chief Commercial Superintendent AIR 1961 Punj 268 (*refd*)
The State Of West Bengal v. Anwar Ali Sarkar [1952] (39) AIR Supreme Court 75 (*refd*)

I

Legislation referred to:

Commercial Vehicles Licensing Board Act 1987, s. 3(1)
Commercial Vehicles Licensing Board (Amendment) Act 2010, s. 9(3),
(9)
Federal Constitution, art. 8, 8(1)
Rules of the High Court 1980, O. 53
Constitution of India, art. 14

For the appellant - Wong Kian Kheong (Alec Tan with him); M/s Wong Kian Kheong

For the respondent - Effandi Nazila Abdullah; SFC

Reported by Ashok Kumar

JUDGMENT**Azahar Mohamed JCA:**

[1] This is an appeal by Metrobus Nationwide Sdn Bhd (the applicant in the High Court) against the decision of the learned judge of the Kuala Lumpur High Court given on 30 September 2009 dismissing part of its claims against the Commercial Vehicles Licensing Board Peninsular Malaysia (the 1st respondent in the High Court) and the Federal Government of Malaysia (the 2nd respondent in the High Court). For convenience and ease of reference, we will refer to parties in this judgment to the title assigned to them in the court below.

[2] The matter before the High Court was by way of judicial review under O. 53 of the Rules of the High Court 1980 filed by the applicant. In essence the applicant sought for an order of *mandamus* and a declaration that the 1st respondent's decision approving the application of Rangkaian Pengangkutan Integrasi Deras Sdn Bhd (RapidKL) to impose rates of fare for stage bus without adhering to the Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 (the "2000 Rules") and the failure, refusal or omission on the part of the 2nd respondent to enforce the rates of fare as prescribed under the said 2000 Rules on RapidKL have violated art. 8(1) of the Federal Constitution and the 2000 Rules.

A **[3]** The undisputed factual background and the sequence of events leading to this appeal are as follows. The applicant is engaged in the business of providing public transport services. The 1st respondent is a statutory body established under s. 3(1) of the Commercial Vehicles Licensing Board Act 1987 (the “1987 Act”).

B The powers of the 1st respondent includes granting of licences to operate various classes of public service vehicles and attaching conditions to licences as the 1st respondent thinks fit.

C **[4]** On 30 July 2007, the 1st respondent granted the applicant licences to operate stage buses as defined under the 1987 Act which means buses plying along a road approved by the 1st respondent for the carriage of passengers on a service which contains fare stages, with a separate fare, time-table and schedule of fare for each fare stage. The rates of fare for stage buses licensed and authorized to operate within the Peninsular Malaysia

D under the 1987 Act is set out in Part 1 of the First Schedule to the 2000 Rules. It is undisputed that the fares charged by the applicant for its stage bus services were, at all material times, in accordance with the 2000 Rules.

E **[5]** In 2003, the 2nd respondent, through a corporate entity, namely Syarikat Prasarana Negara Bhd (“SPNB”), took over, among others, the routes and buses of two public transport companies which provided stage bus services in the Klang Valley, namely Intrakota Komposit Sdn Bhd (“Intrakota”) and Cityliner Sdn Bhd (“Cityliner”).

F

G **[6]** On 26 July 2004, the 2nd respondent through the Ministry of Finance incorporated RapidKL for purposes of providing an integrated public transport system in Klang Valley incorporating bus and rail services. Not long after that, around November 2004, SPNB handed over the operations of, among others, stage bus services of Intrakota and Cityliner to RapidKL.

H **[7]** There is one point which needs to be emphasised here, which turned out to be of critical importance in the dispute between the respective parties herein. The rates of fares charged by RapidKL for its stage bus services, which were approved by the 1st respondent, were much lower as compared to the rates of fare provided under the 2000 Rules. It is the basic complaint of

I the applicant that it has incurred huge losses as a direct consequence to the lower rates charged by RapidKL with the

marked decline in the number of passengers using the applicant's stage buses. The dispute in this case is centred on this basic complaint. According to the applicant, it had suffered loss and other financial problems as a result of the introduction of the RapidKL's fares.

A

[8] The applicant then appealed to the 1st respondent and or the 2nd respondent on various occasions through meetings as well as letters, to take all necessary action to resolve its problems.

B

[9] It appears that despite the applicant's appeals, the 1st respondent and or the 2nd respondent failed, refused or omitted to take any action with regard to RapidKL's fares. Following that, on 10 August 2007, the applicant's solicitors sent a letter of demand to the 1st respondent seeking the 1st respondent to, among others, enforce the rates of fare as prescribed under the 2000 Rules on RapidKL. The reply to the applicant's solicitor letter was a letter dated 28 August 2007 from the 1st respondent which reads:

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D

Ruj.Kami: MECD:LPKP/20/S/204/

1/2 Jld. 3(59)

Tarikh: 28 Ogos 2007

E

Wong Kian Kheong Advocates & Solicitors,
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F

Tuan,

Pengenalan Kadar Tambang Bas Berhenti-henti Yang Berbeza Untuk Laluan Yang Sama Oleh Rangkaian Pengangkutan Integrasi Deras Sdn. Bhd.

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Dengan hormatnya surat tuan ruj. WKK/103/07 bertarikh 10 Ogos 2007 berhubung perkara di atas adalah dirujuk.

2. Untuk makluman, Lembaga Pelesenan Kenderaan Perdagangan (LPKP) dalam mesyuaratnya bil. 7/2006 bertarikh 28 Mac 2006 telah meluluskan kadar tambang yang dipohon dan digunapakai oleh syarikat Rangkaian Pengangkutan Integrasi Deras Sdn. Bhd. (RapidKL) selaras peruntukan seksyen 19 Akta LPKP 1987.

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3. Schubungan dengan itu, Lembaga juga bersedia untuk menimbang permohonan termasuk daripada syarikat Metrobus Nationwide Sdn. Bhd. bagi mengguna pakai kadar tambang seperti yang telah diluluskan kepada syarikat RapidKL.

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- A** Sekian, terima kasih.
“Berkhidmat Untuk Negara”
“Cemerlang, Gemilang, Terbilang”
- B** Saya yang menurut perintah,
(Naimah binti Ramli)
Pengarah
Lembaga Pelesenan Kenderaan Perdagangan
Kementerian Pembangunan Usahawan dan Koperasi
- C** [10] Subsequently, as we have indicated earlier, the applicant had on 11 September 2007 filed the judicial review application seeking the following reliefs:
- D** (a) an order of *mandamus* directing the 1st respondent and 2nd respondent to enforce the rates of fare as prescribed under the 2000 Rules on RapidKL;
- (b) a declaration that:
- E** (1) the 1st respondent’s decision on 28 March 2006 approving RapidKL’s application to impose rates of fare for stage buses as defined under the 1987 Act without adhering to the said Rules (the 1st respondent’s decision); and
- F** (2) failure, refusal or omission on the part of the 1st respondent and or on the part of the 2nd respondent to enforce the rates of fare as prescribed under the said 2000 Rules on RapidKL.
- have violated art. 8(1) of the Federal Constitution and the said Rules.
- G**
- (c) an order of damages to be paid by the 1st respondent and the 2nd respondent to the applicant for the loss and damage suffered by the applicant as a result of the 1st respondent’s decision and the 1st respondent and or the 2nd respondent’s abovesaid failure, refusal or omission and for the amount of damages to be assessed by the court; and
- H**
- (d) an order that the 1st respondent and the 2nd respondent to pay to the applicant interest at the rate of 8% p.a. on the said damages from the date of assessment until full satisfaction of the damages.
- I**

[11] In its application for judicial review, the applicant relied on the following grounds in support of the application: **A**

- (1) the 1st respondent's decision was *ultra vires* the 2000 Rules;
- (2) the 1st respondent had failed to take into account relevant considerations in arriving at its decision; **B**
- (3) in arriving at its decision, the 1st respondent and the 2nd respondent had acted in such a manner that no reasonable public authority in similar circumstances would have acted; **C**
- (4) the applicant had been unfairly discriminated by the 1st respondent and or the 2nd respondent as a result of the 1st respondent's decision as well as the 1st respondent's and or the 2nd respondent's failure, refusal or omission to enforce the rates of fare as prescribed under the said 2000 Rules on RapidKL; **D**
- (5) the 1st respondent's decision as well as the abovesaid failure, refusal or omission on the part of the 1st respondent and or the 2nd respondent had violated the applicant's rights under art. 8(1) of the Federal Constitution; and **E**
- (6) the 1st respondent and or the 2nd respondent had violated the applicant's legitimate expectation.

[12] One important fact requires to be kept in mind. With effect from 31 January 2011, the 1987 Act ceased to apply to Peninsular Malaysia and the 1st respondent was accordingly dissolved. Notwithstanding the dissolution of the 1st respondent, s. 9(3) of the Commercial Vehicles Licensing Board (Amendment) Act 2010 Act (the "2010 Act") provides that the liabilities which immediately before 31 January 2011 were those of the 1st respondent shall devolve on the Suruhanjaya Pengangkutan Awam Darat ("SPAD") as from that date. In this regard, Suruhanjaya Pengangkutan Awam Darat Act 2010 came into operation on 3 June 2010. By virtue of s. 9(9) of the 2010 Act, this appeal may be continued against SPAD as it might have been continued against the 1st respondent as if the Land Public Transport Act 2010 had not been passed. **F**
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[13] Continuing with the sequence of events, on 30 September 2009 the learned judge made the following decisions: **I**

- A (1) granted a declaration that the 1st respondent's decision on 28 March 2006 approving RapidKL's application to impose rates of fare for stage buses without adhering to the 2000 Rules as being *ultra vires* the said 2000 Rules (the first decision);
- B (2) refused to grant the following relief (the second decision):
- (a) order of *mandamus* as there is no specific duty imposed on the 1st respondent and 2nd respondent to enforce the 2000 Rules under the 1987 Act;
- C (b) a declaration that 1st respondent's decision and the 1st respondent and or the 2nd respondent failure have violated art. 8(1) of the Federal Constitution as based on the affidavits filed herein there was insufficient evidence for this court to find that the 1st and 2nd respondents unfairly discriminated against the applicant in favour of RapidKL;
- D (c) damages; and
- (d) interest.
- E [14] The applicant being dissatisfied with part of the decision of the learned judge appealed to this court against the second decision.
- [15] When the appeal came before this court, learned counsel for the applicant chose to abandon completely the *mandamus* relief. In effect, learned counsel restricted the applicant's appeal to just one ground only, namely for a declaration that the 1st respondent's decision approving RapidKL's application to impose rates of fare for stage buses without adhering to the 2000 Rules and or the failure of the 1st and 2nd respondents to enforce the rates of the 2000 Rules on RapidKL had violated art. 8(1) the Federal Constitution and for that reason damages is claimable.
- F
- G
- [16] As in the High Court, it is not contended by the applicant before this court that the 1987 Act and/or the 2000 Rules are discriminatory. Instead, the thrust of the applicant's contention is that both the 1st and 2nd respondents had practised unfair discrimination on the applicant. The applicant's contention is that the 1st respondent as the administrative authority entrusted and assigned with the duty and responsibility of carrying the 1987 Act and the 2000 Rules into operation, has acted in a discriminatory
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manner by treating equals differentially or by not following the policy or principle laid down in that statute regarding its exercise of such a discretion. In this regard, it is the argument of learned counsel for the applicant that both the applicant and RapidKL provide the same stage bus services. Hence, the applicant and RapidKL fall within the same class of public vehicle services as classified by Parliament in the 1987 Act. Though similarly situated within the same class, it was argued that the 1st respondent had treated RapidKL differently by allowing RapidKL to charge fares, without any need to adhere to the 2000 Rules. It was then argued that the constitutional right of the applicant under art. 8(1) Federal Constitution had been violated as a result of the administrative action of both the 1st and 2nd respondents because the 1st respondent has treated the applicant and RapidKL differently in terms of the fares to be charged for the same stage bus services; and that the 1st respondent did not follow the 2000 Rules in regulating its powers to impose condition under the 1987 Act. Learned counsel then brought to the attention of this court the judgment of the Court of Appeal in *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225 to support the proposition that unfair discrimination is an actionable wrong under our law and that damages is claimable if there is a breach of art. 8 of the Federal Constitution.

[17] As a starting point, art. 8(1) of the Federal Constitution expressly provides that all persons are equal before the law and entitled to the equal protection of the law. It is trite law that executive or administrative action which resulted in denial of equal protection of law or equality before law is actionable and can be judicially reviewed as being violative of art. 8 of the Federal Constitution. In *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang*, the Court of Appeal laid down three essential elements that must be proved in order to succeed in establishing unfair discrimination. These elements were explained by Abdul Malek Ahmad JCA (as His Lordship then was) in the following words:

In our judgment, for unfair discrimination to be actionable, the following elements must be proved to exist:

- (a) there must be some form of discrimination;
- (b) the discrimination must be unfair; and
- (c) there must be resultant harm or injury.

- A** Taking the first ingredient, a plaintiff, in order to succeed in an action for unfair discrimination, must establish that discrimination was practised upon him. Generally speaking, discrimination usually occurs when equals are treated unequally or when unequals are treated equally. See *All India Sainik Schools Employees Association v. The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi & Ors* AIR 1989 SC 88 at p. 92.
- B** However, it all depends upon the facts of a given case. It is the conduct of the defendant towards the particular plaintiff that calls for attention and not particular acts or omissions. But this statement must not be taken too far. For, cases may occur where
- C** a single act or omission on the part of the defendant may have a continuing discriminatory effect upon the plaintiff. Take the case of promotions in the sphere of employment. If a plaintiff's promotion is withheld while another who is similarly circumstanced is promoted, it is but one act, or more appropriately, one omission. Nevertheless, it has a discriminatory effect upon the
- D** plaintiff. Whether discrimination was practised in a particular case is a question of fact depending upon the facts and circumstances of the given case. See *Indian Oil Corp Ltd v. Premier Road Carriers Ltd* AIR 1983 Cal 445.
- E** Discrimination *per se* is not actionable unless it is also unfair, and this brings us to the second ingredient. To be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words, there must be unjust or unreasonable or unfair bias in favour of one and against another. See *Dost Mohammad v. Union of India* 1981 Lab IC 1210; *Ranbir Singh v. Chief Commercial Superintendant* AIR 1961 Punj 268.
- F** Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is that nexus may be based on sociological or economic or cultural considerations. But the reference to the existence of
- G** such a nexus is merely a guide. At the end of the day, an objective assessment of the facts of a particular case should leave the court with the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant.
- H** The third ingredient of the wrong is damage. One who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he has suffered some injury recognized by law. The injury may take the form of pecuniary loss. Or it may be non-pecuniary, such as injury to reputation or to property or to livelihood. So long as there is
- I** some injury which the law recognizes, the third requirement is met.

[18] As regards the first element, the facts disclosed that both RapidKL and the applicant provide stage bus services. Both RapidKL and the applicant fall within the regulatory ambit of the 1987 Act and come under the licensing control of the 1st respondent. Rates of fares for stage bus services are provided in the 2000 Rules. Yet, RapidKL's fares are much lower as compared to the rates of fare provided under the rates of the 2000 Rules. Though similarly situated within the same class, the 1st respondent had treated RapidKL differently by allowing RapidKL to charge fares, without any need to adhere to the 2000 Rules. By reasons of the matters aforesaid, it is the argument of learned counsel for the applicant that discrimination is practised upon the applicant because though in similar circumstances, RapidKL and the applicant are treated differently. We find this argument persuasive. The principle underlying art. 8 of the Federal Constitution is that a law must operate alike on all persons under like circumstances (per Suffian LP in *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 1 LNS 100). Discrimination occurred in the present case as the applicant was treated unequally by the 1st respondent.

[19] Having said that, we now turn to the second element, that is to say the discrimination must be unfair. This is a crucial issue into which we must look more closely. On this issue, it is the arguments of learned counsel for the applicant that the learned judge ought to have found that the applicant had received unfair treatment in the hands of the 2nd respondent based on the following undisputed facts:

- (i) RapidKL is a wholly-owned company of the 2nd respondent;
- (ii) RapidKL is the "vehicle" incorporated by the 2nd respondent to implement an integrated public transport system in Klang Valley incorporating bus and rail services;
- (iii) the 1st and or 2nd respondents had omitted to take action against RapidKL despite the applicant's appeals;
- (iv) the 1st and or 2nd respondents had failed to implement the rates of fare in the 2000 Rules despite the letter of demand issued by the applicant's solicitor;
- (v) the 1st respondent's decision of 28 March 2006 violated the 1987 Act and the 2000 Rules.

- A **[20]** The same arguments were in point of fact canvassed before the learned judge, who after that made the following findings:

B To my mind the facts relied on by the applicant to show unfair discrimination ie, that RapidKL is a wholly-owned company of the 2nd respondent; RapidKL is a 'vehicle' incorporated by the 2nd respondent to implement INSPAK; that the 1st and or 2nd respondents had omitted to take action against RapidKL despite the applicant's appeals and the 1st and or 2nd respondent had failed to implement the rates of fare in the said Rules despite the applicant's letter of demand to that effect (see paragraph 24 of end. (3)) do not leave the court with the impression that the applicant had received "harsh, unreasonable or unfair treatment" in the hands of the respondents such that the applicant could be said to be unfairly discriminated against.

C This is particularly so in the light of the 1st respondent's reply that "Respondent Pertama tidak pernah menghalang mana-mana pihak termasuk Pemohon untuk mengemukakan permohonan bagi menggunakan kadar tambang sama sepertimana RapidKL" (see paragraph 13.3, end. (12)). Further according to the 1st respondent:

E ... sehingga kini. Pemohon adalah merupakan satu-satunya syarikat bumiputra yang mendapat lesen bas berhenti-henti yang terbanyak di Lembah Kelang. (see para 16.4, end. (12)).

- F **[21]** As mentioned earlier, to be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words there must be unjust or unreasonable or unfair bias in favour of one and against another. In the context of the case at hand, the applicant must establish that the introduction of RapidKL fares was unjust or unreasonable or unfair bias in favour of RapidKL and against the applicant. The question at issue is primarily whether, upon an objective assessment of the facts of the present case, the differential treatment by the 1st respondent amount to undue preference or unreasonable discrimination.
- G In determining this question various factors must be taken into consideration, including the general public interest. This point is not without authority. In *Ranbir Singh v. Chief Commercial Superintendent* AIR 1961 Punj 268 the court considered the question whether the differential treatment by the Railway Authorities is unreasonable. On this issue, at p. 271 the court said:
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Whenever there is a differential treatment by the Railway Company, then the question arises whether such treatment amounts to undue preference or unreasonable discrimination or distinction. There is no precise formula for determining this question with accuracy. There are many factors which must be taken into consideration for this purpose. It is impossible to describe the various factors which have to be taken into consideration for deciding this matter.

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To give a few examples, different transport conditions, facilities available at the destination station, and competition with other kinds of transport are some of the factors that require consideration for determining whether the distinctive or differential treatment is reasonable or not. The general public interest and the effect of charges on the development of the country as a whole have been considered to be good grounds for fixing differential rates both in England and America.

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[22] The case of *Ranbir Singh v. Chief Commercial Superintendent* was referred by Abdul Malek Ahmad JCA (as His Lordship then was) in *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* when His Lordship explained the pre-requisite of unfair discrimination.

E

[23] In the present case, the applicant has acknowledged that on 26 July 2004, the 2nd respondent through the Ministry of Finance had incorporated RapidKL for purposes of providing an integrated public transport system in Klang Valley incorporating bus and rail services (see the 1st affidavit of the 1st respondent at para. 11). But most significantly, the 1st respondent has explained that the approval given to RapidKL's fares was based on the policy and strategy of providing an integrated public transport services in the Klang Valley. The 1st respondent's affidavit affirmed by a director of the 1st respondent dated 30 April 2008, *inter alia*, avers as follows:

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... saya menyatakan bahawa kelulusan Kadar Tambang mengikut Jenis Perkhidmatan yang diberikan kepada RapidKL adalah berasaskan kepada matlamat dasar dan polisi INSPAK.

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[24] In the 1st respondent's affidavit, a letter from the Ministry of Finance dated 24 April 2008 is exhibited which explained the background and purpose behind the incorporation of RapidKL. The letter reads as follows:

I

- A** KK/BMKD(S)10/727/830/1 JD.3(2)
24 April 2008
- B** Pengarah
Lembaga Pelesenan Kenderaan Perdagangan
Kementerian Pembangunan Usahawan dan Koperasi
Aras 4, Blok Podium
Lot 2G6, Presint 2
Pusat Pentadbiran Kerajaan Persekutuan
62100 Putrajaya
(u.p.: Encik Ismail Che Hussain)
- C** Tuan,
- D** **Permohonan Maklumat Penubuhan Syarikat Prasarana
Negara Bhd dan Syarikat Rangkaian Pengangkutan Integrasi
Deras Sdn Bhd**
- E** Dengan hormatnya saya diarah merujuk kepada surat Lembaga
Pelesenan Kenderaan Perdagangan bertarikh 19 Mac 2008
berhubung perkara tersebut di atas dan ingin dimaklumkan bahawa
Jemaah Menteri di dalam mesyuaratnya pada 15 Oktober 2003
telah mengambil maklum perkara-perkara berikut:
- F** i. Bagi mengatasi masalah pengangkutan awam yang tidak
memuaskan akibat dikendalikan oleh banyak syarikat
pengangkutan awam, sebuah Jawatankuasa Pemandu telah
ditubuhkan di Jabatan Perdana Menteri untuk mengkaji
langkah-langkah mengatasi masalah pengangkutan awam di
- G** Lembah Kelang;
- ii. Jawatankuasa Pemandu mengesyorkan penyusunan semula
pengangkutan awam adalah dengan mengasingkan pemilikan
aset dan operasi iaitu dengan mewujudkan Pemilik Aset
Utama (Main Asset Owner) dan Pengusaha Utama (Master
Operator);
- H** iii. Struktur penyusunan semula adalah seperti berikut:
- Pemilik Aset Utama (Main Asset Operator) –
Aset LRT PUTRA, LRT STAR, Parkmay dan Intrakota
akan dimiliki oleh Kerajaan di bawah Syarikat Prasarana
Negara Berhad (SPNB). Aset ini akan dipajakkan kepada
Pengusaha Utama melalui Perjanjian Pajakan; dan
- I** – Pengusaha Utama (Master Operator) –
Perkhidmatan LRT PUTRA, LRT STAR, Parkmay dan
Intrakota akan dikendalikan oleh sebuah syarikat swasta
baru;

2. Ekoran daripada keputusan Jemaah Menteri tersebut, Kementerian Kewangan telah menubuhkan Syarikat Rangkaian Pengangkutan Integrasi Deras Sdn Bhd (RapidKL) pada 26 Julai 2004 sebagai sebuah syarikat pengendali sistem pengangkutan awam Lembah Kelang, manakala Syarikat Prasarana Sdn Bhd yang ditubuhkan pada 11 Ogos 1998 kekal sebagai pemilik utama aset pengangkutan awam.

3. Bersama-sama ini dikemukakan juga maklumat asas berhubung dengan Prasarana dan RapidKL seperti berlampir untuk perhatian tuan jua.

Sekian, Terima kasih.

“Berkhidmat Untuk Negara”

Saya yang menurut perintah,

(Eshah binti Meor Sulaiman)

Setiausaha Bahagian Pelaburan, MKD dan Penswastaaan
b.p. Ketua Setiausaha Perbendaharaan.

s.k. TKSP (S&K)

[25] The basic fact that can be gleaned from the above is that the element of general public interest has been taken into consideration by the 1st respondent for fixing differential rates of fare for stage buses. From this, it seems clear to us that the 1st respondent's decision on 28 March 2006 approving RapidKL's application to impose lower rates of fares for such services cannot be said to be arbitrary or excessive. In our judgment, upon an objective assessment of all the relevant facts of the present case, the introduction of RapidKL fares were not unjust or unreasonable or unfair bias in favour of RapidKL. There is legitimate reason necessitating the 1st respondent allowing RapidKL to impose fares for stage buses without adhering to rates of fare as prescribed under the 2000 Rules. On the basis of the factual matrix and the circumstances prevailing in the present case, in our judgment, this departure or deviation is rational and reasonable and should not be suggestive of discrimination or arbitrariness as it would serve the general public interest of providing a better and efficient public transport services in the Klang Valley.

A [26] There is another reason why we have come to the above
conclusion. When the 2000 Rules is not itself discriminatory and
the present claim of unfair discrimination is against the 1st
respondent who is entrusted with the duty of carrying it into
operation, in our judgment, the 1st respondent has a good
B defence if it could prove that it has acted *bona fides* on its part.
The authority to support this principle is the case of *The State Of
West Bengal v. Anwar Ali Sarkar* [1952] (39) AIR Supreme
Court 75, where the Supreme Court of India considered the
question of whether s. 5(1) of the Bengal Special Courts (X (10)
C of 1950) was *ultra vires* art. 14 of the Constitution of India (which
is equivalent to art. 8 of the Federal Constitution). Mukherjea J
speaking on the subject of defence of *bona fide* said at p. 92 of
the report as follows:

D It appears to be an accepted doctrine of American Courts that the
purpose of the equal protection clause is to secure every person
within the states against arbitrary discrimination whether
occasioned by the express terms of the statute or by their
improper application through duly constituted agents. This was
clearly laid down in *Sunday Lake Iron Co. v. Wakefield* (1918) 247
E U.S. 350. In this case, the complaint was against a taxing officer,
who was alleged to have assessed the plaintiff's properties at their
full value, while all other persons in the country were assessed at
not more than one third of the worth of their properties. It was
held that the equal protection clause could be availed if against the
F taxing officer; but if he was found to have acted *bona fides* and
the discrimination was the result of a mere error of judgment on
his part, the action would fail. The position, therefore, is that
when the statute is not itself discriminatory and the charge of
violation of equal protection is only against the official, who is
entrusted with the duty of carrying it into operation, the equal
G protection clause could be availed of in such cases, but the officer
would have a good defence if he could prove *bona fides*.

[27] Coming back to the present case, there is nothing to show
that the 1st respondent had acted *mala fide* or out of improper
motive. This then refers back to what we have said earlier. The
H 1st respondent's explanation that the approval given to RapidKL's
fares was based on the policy objective of providing an integrated
public transport services in the Klang Valley proved that the
approval was made in good faith or at least with *bona fides*
I intention.

[28] From this point on, we shall deal with the third element, that is to say, damage or resultant injury arising from the alleged discriminating act. It is the contention of the applicant that there is clear evidence to show that the 1st respondent's decision in approving lower rates of fare charged by RapidKL had led the applicant to suffer massive financial losses as a result of sharp decline in the number of passengers in the applicant's stage bus services since 21 April 2007. This is the essence of his arguments. On this issue, the learned judge made the following findings:

... I agree with the SFC's submission that the applicant has failed to show by credible and cogent evidence that the abovesaid loss was due to the lower rates of fare charged by RapidKL. In other words the applicant had failed to establish a nexus between the reduction in the applicant's income or profits from the fare collection with the introduction of RapidKL's fares. The purported reduction in the daily and monthly fare collection as shown in Exhibit A-7(b) (Pg. 51 of encl 3) was not based on any study or survey carried out by the applicant. As submitted by the learned SFC, the reduction in the number of passengers after 21.4.2007 as contended by the Applicant (and the consequent loss of profits or income) could be due to a variety of factors which may or may not include the lower fares charged by RapidKL. In the absence of such a survey or study or any other form of verification I would agree with the Respondents' contention that the Applicant's claim that the abovesaid loss was attributable the 1st respondent's decision was purely an assumption on the part of the applicant. The applicant had therefore failed to establish that it had suffered any resultant harm or injury from the alleged discriminatory act.

[29] We have carefully read the whole of the evidence in the appeal record. In vain we searched through the record for concrete evidence of any nexus to show that the financial difficulty suffered by the applicant was mainly caused by RapidKL's fares which was much lower as compared to the rates of fare provided under the 2000 Rules. In this regard, it must be noted the chairman of the 1st respondent in his affidavit in reply dated 4 March 2008 at para. 13, has explained that RapidKL's *modus operandi* is different from that of the applicant. It is a valid argument to make that the choice of consumers is not dictated solely by the lowering of fares. More than that, the financial difficulty by the 1st respondent suffered could very well be due to different transportation environment, facilities available, volume of

- A traffic, management skill, strategic planning and other range of causes, which may not include the lower fares charged by the RapidKL. As stated by the learned judge and we respectfully agree with her, the purported reduction in the daily and monthly fare collection was not based on any credible study or market survey carried out by the applicant. To which we will add that in a substantive motion for judicial review, the applicant has the evidential burden to establish a nexus between the reduction in the applicant's income or profits from the fare collection with the introduction of RapidKL's fares. A person who asserts the existence of any fact must prove the fact exists. Viewed in this context, on the facts, we conclude by saying that the applicant has failed to establish that the introduction of RapidKL's fares had led the applicant to suffer loss and other financial problems.
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- D [30] It therefore follows the learned judge was entirely correct in holding that there was insufficient evidence to support a finding that the 1st respondent and or the 2nd respondent had practised unfair discrimination on the applicant.
- E [31] It is for all these reasons that we dismiss this appeal with costs of RM5,000. Deposit to the respondents to account of costs.
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